

International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corporation) and Robert L. Castor. Case 32-CB-1 (formerly 20-CB-2245)

June 24, 1982

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On February 16, 1982, Administrative Law Judge Richard J. Boyce issued the attached Second Supplemental Decision in this proceeding.¹ Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Second Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge recommended that interest on the backpay award be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). However, the method of determining the interest rate set forth in that Decision is not applicable in cases in which an earlier order of the Board providing for a different interest rate has been enforced by a court of appeals. Accordingly, we shall order interest to be paid at the rate of 6 percent, as ordered in our original decision and enforced by the court of appeals.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby Orders that the Respondent, International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO, Oakland, California, its officers, agents, and representatives, shall pay to the estate of Robert L. Castor the sum of \$3,705, plus interest thereon to the date of payment, at the rate of 6 percent per annum as stated in the original decision.

¹ The original decision is reported at 192 NLRB 1069 (1971). The supplemental decision is reported at 213 NLRB 457 (1974).

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: By decision reported at 192 NLRB 1069 (1971), the Board found that International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (herein called Respondent), had violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, by causing Judson Steel Corporation (herein called Judson) to discharge Robert L. Castor on May 8, 1970. The Board's decision was adopted by the United States Court of Appeals, Ninth Circuit, in an unreported decision dated May 15, 1972.¹

By supplemental decision reported at 213 NLRB 457 (1974), the Board determined that Castor was entitled to backpay from Respondent of \$12,292, plus interest, and that Respondent in addition should pay \$1,986 into a pension trust fund on his behalf. This determination was premised upon acceptance of the contentions made in the backpay specification that the backpay period ran from the date of Castor's discharge until Respondent informed Judson on July 25, 1972, that it no longer objected to Castor's employment; and that 17 named ironworkers who had worked for Judson during each quarter of the backpay period comprised a representative group for purposes of positing Castor's wage levels and the number of hours he reasonably could have been expected to work had it not been for Respondent's misconduct.

In a decision reported at 532 F.2d 1241 (1976), the Ninth Circuit declined to adopt the Board's supplemental decision, instead remanding the matter to the Board for further proceedings. The court's reasons were two:²

1. The "representative-employee formula" relied upon was not "representative of Castor" inasmuch as the 17 ironworkers comprising the control group "were part of a group of 22 men who were the most steadily employed journeymen ironworkers out of all of the 150 who worked during the period," whereas Castor "was at best but an average ironworker," and "to treat him as one of the elite group of the most steadily employed was arbitrary."

2. "[I]n an industry where employment is intermittent, the fact of intermittency must be taken into account in some measure unless there is something in the record which justifies a finding that, for some reason, the employee involved would not have been affected by the fluctuations that affected the group as a whole."

The Board accordingly issued an Order Remanding Proceeding to Regional Director, reported at 227 NLRB 692 (1977), with instructions to issue "a new backpay specification recomputing the backpay owed by Respondent to Robert L. Castor . . . in a manner not inconsistent with the opinion of the court of appeals."³

The Regional Director in turn issued a revised backpay specification, dated April 30, 1981, alleging that Respondent's "obligation . . . will be discharged" by payment to Castor's estate, he since having died, of \$3,705,

¹ Reported unofficially at 80 LRRM 2627, 68 LC ¶ 12,730.

² 532 F.2d at 1243-44.

³ 227 NLRB at 693.

"plus interest to the date of payment." In arriving at this figure, the revised specification departs from the original in two significant respects. First, it defines the representative group as 10 named ironworkers employed by Judson who:

1. "Were employed during the two full quarters in which Castor worked at Judson . . . prior to his loss of employment."

2. "Commenced their employment at approximately the same date or later than Castor."

3. Had "total earnings during the two full quarters prior to Castor's loss of employment . . . substantially similar to Castor's total earnings for that period."

Second, the revised specification alleges that the backpay period ended June 30, 1971, "at which time over one-half of the [10] employees in the representative sample had been laid off," rather than July 5, 1972.⁴

A hearing on the revised backpay specification was held before me in Oakland, California, on December 15, 1981.

Respondent's Contentions

Respondent contends in its brief that the revised specification fails to cure the defects of its predecessor as concerns a representative group, asserting that "virtually all [of the 10] were journeyman ironworkers who had been in the trade for a long period of time," and thus:

The only thing that these ironworkers had in common with Mr. Castor was that they were employed at about the same time by Judson.

Respondent proposes no alternative representative-employee formulation, instead arguing that, since Judson did not hire a replacement for Castor, no backpay should be owing; that, if this argument is rejected, the backpay period should be confined to about 1 week because, Judson's complement having shrunk from 32 on about May 8, when Castor was discharged, to about 17 by May 17, "it is unlikely that Mr. Castor would have survived the serious cutback in employment as of May 17";⁵ and that, if this argument also is rejected, the backpay period should end in August 1970 when Judson's complement on the project in question was reduced to two—the foreman and the job steward.

Respondent does not dispute the statements of fact contained in the revised specification.

Conclusions

It is concluded that the representative-employee formulation of the revised specification sufficiently considers Castor's being "but an average ironworker" rather than "one of the elite group of the most steadily employed"; that it is not otherwise arbitrary or unreason-

able; and that it therefore overcomes the Ninth Circuit's objection to the original specification in that regard, and meets the liberal standards of discretion permitted the General Counsel in such matters.

It is concluded that the revised specification's linking of the closing date of the backpay period to the time when over one-half of those in the control group were laid off also makes adequate allowance for Castor's being "but an average ironworker," and in addition satisfies both the court's mandate that "intermittency . . . be taken into account" and, again, the considerable latitude given the General Counsel as concerns the computation of backpay.

Respondent's argument that the 10 comprising the new control group had nothing in common with Castor other than that "they were employed at about the same time by Judson," the 10 having been "in the trade for a long period of time," is fallacious for at least two reasons. First, it is based on the testimony of its business manager, Richard Zampa, that, as of the time of the present hearing, over 11 years after the misconduct in question, 6 of the 10 had been journeymen for from 12 to 20 years. Second, it presupposes without any demonstrated basis that skill necessarily correlates with time in the trade; or, in the alternative and contrary to the evidence, that Judson tied order of layoff to time in the trade, as opposed to relative skills.

Respondent's other contentions likewise are rejected. To conclude from Judson's nonhire of a replacement that Castor is without entitlement would be to negate the earlier finding that Respondent's inducement of his discharge was unlawful, and ignores the point elsewhere stressed by Respondent that the project was winding down. That contention and Respondent's remaining two—the unlikelihood that Castor "would have survived" the shrinkage of the complement from 32 to about 17 as of May 17, and the probability that he would have left the project before the August reduction of the complement to the foreman and the job steward—fail for the further reason that they disregard the distinct possibility that Judson, as it had before, would shift Castor to one of its other projects at such time as it had no need for him on the project in question.

ORDER⁶

The Respondent, International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO, its officers, agents, and representatives, shall pay to the estate of Robert L. Castor the sum of \$3,705, plus interest thereon until paid in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), as modified by *Florida Steel Corporation*, 231 NLRB 651 (1977).

⁴ Although contending that the backpay period should run through June 30, 1971, the revised specification seeks no backpay after September 30, 1970, conceding that Castor's interim earnings from then on exceeded what he reasonably would have received from Judson.

⁵ Respondent elaborates, in support of this argument, that Castor was "an average ironworker"; that Judson "lays people off by the abilities of the people," as a Judson official did testify; that the operative labor agreement did not dictate that seniority be a factor in layoffs; and that, according to Respondent's business manager, Richard Zampa, Castor was not considered to be experienced in the trade.

⁶ All outstanding motions inconsistent with this Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.